

5-1-1995

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Recommended Citation

Kachuriak, Kristie M. (1995) "Chinese Copyright Piracy: Analysis of the Problem and Suggestions for Protection of U.S. Copyrights," *Penn State International Law Review*: Vol. 13: No. 3, Article 10.
Available at: <http://elibrary.law.psu.edu/psilr/vol13/iss3/10>

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Chinese Copyright Piracy: Analysis of the Problem and Suggestions for Protection of U.S. Copyrights

I. Introduction

The United States and China averted a potential trade war in the early months of 1995.¹ Against the backdrop of threatened trade sanctions, the two countries negotiated and reached an agreement to improve China's intellectual property protection system and to curb Chinese copyright infringement.²

Chinese piracy of U.S. copyrights has resulted in annual losses of approximately \$827 million to U.S. companies.³ Piracy is especially rampant in the audiovisual, computer software, and publishing industries.⁴ Indeed, U.S. companies such as Walt Disney, Nintendo, Microsoft, and Polygramis have entered the Chinese market only to find it plagued with copyright infringers.⁵

According to the Business Software Alliance (BSA), a software industry trade group,⁶ Chinese software piracy cost U.S. software publishers \$225 million in 1992 and \$322 million in 1993.⁷ In addition, BSA estimates that ninety-four percent of software used in China is pirated.⁸ For example, China's Schenzhen University made 650,000 holograms identical to holograms used on Microsoft software boxes to simulate product authenticity.⁹ The pirated software cost Microsoft \$30 million in losses.¹⁰

1. *U.S., China Announce Broad Agreement on Intellectual Property Protection*, 49 Pat. Trademark & Copyright J. (BNA), at 514-15 (Mar. 2, 1995).

2. *Id.*

3. *Chinese Legal Officials Outline Harsh Penalties for IP Violators*, 11 Int'l Trade Rep. (BNA) No. 21, at 804 (May 25, 1994). The executive director of the International Intellectual Property Alliance reports that China has the highest copyright piracy rates in the world. Sheila Tefft, *U.S. Message to China: Punish Patent Pirates*, CHRISTIAN SCI. MONITOR, Oct. 28, 1994, at 9.

4. *Enforcing Intellectual Property Law Takes More Than Going by the Book*, S. CHINA MORNING POST, Apr. 13, 1994, at 3, available in LEXIS, World Library, SCHINA File.

5. *China Cited Under Special 301 Law: Copyright Protection Criticized*, 11 Int'l Trade Rep. (BNA) No. 27, at 1066 (July 6, 1994).

6. *Enforcing Intellectual Property Law Takes More Than Going by the Book*, *supra* note 4, at 3.

7. *Id.*

8. *China Condemns U.S. Decision to Cite Shortcomings on Intellectual Property*, 11 Int'l Trade Rep. (BNA) No. 27, at 1067 (July 6, 1994).

9. *China Plans Meeting on Copyright Piracy*, REUTERS WORLD SERV., Mar. 26, 1994, available in LEXIS, World Library, REUWLD File.

10. *Id.* Additionally, Chinese piracy cost Microsoft \$351 million in foregone sales in 1994.

The music industry also is replete with infringement. For instance, it is estimated that China's compact disk (CD) piracy costs U.S. producers \$345 million a year.¹¹ The extent of compact disk piracy is exemplified by the twenty-six compact disk factories in southern China that produce eighty million pirated CDs per year.¹² Of the eighty million pirated CDs produced, seventy-five million are exported to markets throughout the world.¹³

Growing contacts with other nations have made China realize that abuses of intellectual property rights will no longer be tolerated.¹⁴ To encourage foreign companies to sell, license, and transfer technology and goods to China, it is necessary for China to strengthen its intellectual property protection system and to make the best possible use of the laws it has enacted to ensure protection of ownership rights in the goods transferred. Reliable intellectual property laws provide foreign companies familiar legal ground upon which to do business in China.¹⁵

For this reason, as of late February 1995, China has agreed to the terms of a new agreement with the United States to improve copyright protection in particular and intellectual property protection in general. China has promised in the past, however, to remedy the problem of copyright infringement and has made attempts to improve intellectual property protection. Despite these efforts, the problem has persisted and in all likelihood will not immediately disappear even with the new agreement. Accordingly, this Comment presents an analysis of the copyright dispute between the two countries, an assessment of China's intellectual property protection system, and a discussion of the means by which the United States can protect U.S. copyrights and other intellectual property rights abroad.

U.S. Firms Hopeful, Cautious on China Trade Issue, BC CYCLE, Feb. 6, 1995, available in LEXIS, News Library, CURNWS File.

11. Amy Borrus et al., *Will China Scuttle Its Pirates?*, BUS. WK., Aug. 15, 1994, at 40, available in LEXIS, Asiapc Library, BUSWK File.

12. *Id.*

13. *Id.* Chinese-made pirated goods are exported to the United States and other countries. Tefft, *supra* note 3, at 9. During 1993, \$120 million of Chinese-produced counterfeit goods were seized in the United States. *Id.*

14. *Round Up: China Makes Great Efforts to Protect Intellectual Property Rights*, XINHUA NEWS AGENCY, May 24, 1991, available in LEXIS, World Library, XINHUA File. Intellectual property rights infringement has emerged as a major obstacle to improving relations between the United States and China. Tefft, *supra* note 3, at 9. However, Chinese authorities argue that China should be given leeway regarding intellectual property infringement because China is a developing country. Uli Schmetzer, *China Taking the Wind Out of Copyright Pirates' Sales*, CHI. TRIB., Aug. 10, 1994, at 1, available in LEXIS, News Library, MAJPAP File.

15. LAURENCE J. BRAHM, *INTELLECTUAL PROPERTY LAW IN THE PEOPLE'S REPUBLIC OF CHINA* viii (1988).

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Part II of this Comment suggests that the source of Chinese copyright piracy stems from differing views of intellectual property protection in the United States and China and discusses the history of copyright in the two countries. Part III will then examine China's attempts to remedy copyright infringement and improve its intellectual property protection. Specifically, Part III includes an analysis of the Chinese Copyright Law of 1990,¹⁶ China's accession to the Berne Convention for the Protection of Literary and Artistic Works¹⁷ and Universal Copyright Convention,¹⁸ and the formation of intellectual property courts and administrative offices for intellectual property protection. Part IV then analyzes whether China's attempts to improve intellectual property protection have curbed copyright infringement of U.S. goods. Finally, Part V identifies the options available to the United States to protect U.S. interests in China, with particular focus on section 301 of the Omnibus Trade and Competitiveness Act of 1988,¹⁹ commonly referred to as "Special 301."²⁰ Part V also discusses China's desire to become a member of the General Agreement on Tariffs and Trade²¹ and considers how the United States can utilize the Agreement on Trade Related Aspects of Intellectual Property²² if China is eventually granted GATT membership.

II. United States v. China: Conflicting Perceptions of the Importance of Copyright Protection

China and the United States have two very distinct histories with respect to copyright law, which accounts for the fundamentally different views of copyright law in these countries. For over two hundred years, the United States has placed a premium on protection of literary and

16. P.R.C. Copyright Law of Sept. 7, 1990, *reprinted in* COPYRIGHT MONTHLY REV. OF THE WORLD INTELL. PROP. ORG., Feb. 1991, at text 2-01, 1-8 [hereinafter P.R.C. Copyright Law]. The P.R.C. Copyright Law was adopted at the 15th Session of the Standing Committee of the Seventh National People's Congress and the English translation is provided by the National Copyright Administration of China. *Id.*

17. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 168 Parry's T.S. 185, *revised* Nov. 13, 1908, 1 L.N.T.S. 218, *revised* June 2, 1928, 123 L.N.T.S. 233, *revised* June 26, 1948, 331 U.N.T.S. 217, *revised* July 14, 1967, 828 U.N.T.S. 221, *revised* July 24, 1971 [hereinafter Berne Convention].

18. Universal Copyright Convention, Sept. 6, 1952, U.S.T. 2731, 216 U.N.T.S. 132, *revised* July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 194 [hereinafter UCC].

19. Pub. L. No. 100-418, 102 Stat. 1107 (1988).

20. Special 301 is codified at Pub. L. No. 100-418, 102 Stat. 1107, 1164-76 (1988).

21. General Agreement on Tariffs and Trade, Dec. 15, 1993, 33 I.L.M. 29 (1994) [hereinafter GATT].

22. Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Dec. 15, 1993, 33 I.L.M. 81 (1994) [hereinafter TRIPS].

artistic work. Therefore, it is understandable that the United States expects other countries to recognize the importance of copyright protection. In contrast, China's recognition of intellectual property rights is very recent, only dating back to the late 1970s. As such, the history of copyright in the United States and China illustrates that the differences inherent in the two systems may be one reason for the infringement problem.

A. U.S. History of Copyright

In the United States, concern for the protection of literary works and recognition that copyright would achieve the desired protection dates back to colonial times.²³ The framers of the Constitution included protection for literary works in Article I, Section 8, Clause 8. This provision gives Congress "the power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."²⁴ Pursuant to this clause, in 1790, Congress enacted the first copyright statute.²⁵ Thus, in the United States, the basis for federal copyright protection is over 200 years old.

Americans view copyright as an economic property right.²⁶ Essentially, U.S. copyright law grants authors a negative economic right, which is "the right to prevent unlawful copying of their work."²⁷ The current copyright law²⁸ extends protection to literary, dramatic, musical, artistic and other intellectual work.²⁹ To be copyrightable, a work must be an original work of authorship that is fixed in a tangible medium of expression.³⁰

The United States also endeavors to promote the international protection of copyrights, as it is a signatory of the two major international copyright conventions. First, in 1955, the United States ratified the 1952 version of the Universal Copyright Convention (UCC).³¹ The UCC was revised in Paris in 1971 and this revision was

23. See generally BRUCE W. BUGBEE, *THE GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW*, 57-83, 104-24 (1967).

24. U.S. CONST., art. I, § 8, cl. 8.

25. BUGBEE, *supra* note 23, at 145.

26. TRADEMARKS, COPYRIGHTS, AND UNFAIR COMPETITION FOR THE GENERAL PRACTITIONER, ALI-ABA COURSE OF STUDY MATERIALS 193 (1994).

27. JAMES E. HAWES, *COPYRIGHT REGISTRATION PRACTICE* 29-4 (1994).

28. The current copyright law is codified at 17 U.S.C. §§ 101-1010 (1988).

29. See 17 U.S.C. § 102(a) (1988).

30. *Id.*

31. HAWES, *supra* note 27, at 29-2. See UCC, *supra* note 18.

ratified by the United States in 1974.³² Under the UCC, member nations may require foreign published works to comply with national formalities.³³

The second major international copyright convention is the Berne Convention for the Protection of Literary and Artistic Works [hereinafter Berne Convention].³⁴ The United States joined the Berne Convention in 1989.³⁵ As a signatory to the Berne Convention, the United States "agree[s] to treat nationals of other member countries like their own nationals for purposes of copyright."³⁶

To summarize, the U.S. copyright system is a sophisticated system that has been in place for over 200 years. Early on, Americans recognized the importance of protecting original literary work. The U.S. view, that copyright is an economic right, is protected by both the U.S. Constitution and statutory law. Finally, the United States promotes international protection of copyright, as a member of both the UCC and the Berne Convention.

B. China's History of Copyright and Intellectual Property Right

During China's Cultural Revolution, all forms of artistic and literary expression were reduced to expressions of state ideology and all works created were considered to be without value.³⁷ When the People's Republic of China (PRC) was established in October 1949,³⁸ the Chinese Communist Party instituted a body of law consistent with Marxist-Leninist beliefs.³⁹ Under this system, literary, scientific, and artistic works were not considered to be personal property.⁴⁰ To the contrary, Chinese Communists believed that property should be collectively owned by the state to eliminate class inequities.⁴¹ Thus, all authors were salaried employees of the state and did not expect

32. HAWES, *supra* note 27, at 29-2.

33. UCC, *supra* note 18; *see also* HAWES, *supra* note 27, at 29-3.

34. Berne Convention, *supra* note 17.

35. *See* Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

36. Berne Convention, *supra* note 17; *see also* HAWES, *supra* note 27, at 29-5.

37. BRAHM, *supra* note 15, at 61.

38. ALBERT HY CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 24 (1992).

39. Richard Goldstein, Note, *Copyright Relations Between the United States and the People's Republic of China: An Interim Report*, 10 BROOK. J. INT'L L. 403, 410 (1984).

40. Stephanie L. Sgambati, Comment, *China's Accession to the Berne Convention: Bandaging the Wounds of Intellectual Property Piracy in China*, 3 FORDHAM ENT., MEDIA & INTELL. PROP. L.F. 139, 142 (1992) (citing generally, CHINA UNDER MAO: POLITICS TAKES COMMAND 99-118 (Roderick MacFarquhar ed., 1966)).

41. *Id.* at 142 (citing EDWARD E. RICE, MAO'S WAY 83-119 (1972)).

renumeration for their works.⁴² Under this system, copyright protection was irrelevant.⁴³

After Mao Tse-Tung's death in 1976,⁴⁴ China instituted a new policy of "strengthening the legal system" to accelerate economic growth.⁴⁵ Gradually, authors became more independent, engaging in freelance work, joining author's societies and associations, and leaving state research institutions to form research groups of their own.⁴⁶ Under China's new policy, the need to protect author's rights has been recognized.⁴⁷ Despite increasing recognition of author's rights, however, China did not immediately pass a copyright law.⁴⁸ Rather, China's copyright law was not enacted until September 7, 1990 at the Fifteenth Session of the Standing Committee of the Seventh National People's Congress.⁴⁹ The law became effective on June 1, 1991.⁵⁰

Because China's copyright history is so new, it is beneficial to consider China's system for protecting intellectual property rights to better understand China's attitude toward intellectual property. Consideration of the Chinese view of intellectual property is also helpful to determine how far China's copyright law has advanced.

A trademark law was enacted in China in 1983, and revised in 1993.⁵¹ A patent law was implemented in 1985, and amended and revised in 1992.⁵² Further, intellectual property rights were first defined in the General Principles of the Civil Law, effective January 1,

42. BRAHM, *supra* note 15, at 61-62.

43. *Id.* at 62.

44. Sgambati, *supra* note 40, at 141.

45. *Id.* at 146. See also Tao-tai Hsia & Wendy I. Zeldin, *Recent Legal Developments in the People's Republic of China*, 28 HARV. INT'L L.J. 249, 254 (1987).

46. BRAHM, *supra* note 15, at 62. The concept of copyright became relevant as authors gained independence, because without it, the incomes of independent individuals and groups were at stake. *Id.*

47. Sgambati, *supra* note 40, at 146.

48. *Id.* at 147. Certain factors contributed to China's delay in passing a copyright law. *Id.* First, there was the communist ideological barrier rejecting the concept of private property. Joseph T. Simone, *Copyright in the People's Republic of China: A Foreigner's Guide*, 7 CARDOZO ARTS & ENT. L.J. 1, 9 (1988). Second, China viewed protection of foreign works as an economic burden to publishers and consumers. *Id.* at 10. Finally, there were fears that judges and lawyers would not be able to address the complex issues associated with copyright and that litigation would increase in the already overburdened courts. *Id.* at 8.

49. White Paper—"Intellectual Property Protection in China", BBC SUMMARY OF WORLD BROADCASTS, June 20, 1994, available in LEXIS, World Library, BBCSWB File. The White Paper was released by the information office of China's State Council and explains China's position regarding intellectual property.

50. *Id.*

51. *Id.*

52. *Id.*

1987.⁵³ This legislation defined intellectual property rights as civil rights of citizens and legal persons.⁵⁴

Although Chinese protection of intellectual property rights began just a short time ago, China has accelerated the process of establishing an intellectual property protection system since opening up its economy to the outside world.⁵⁵ The acceleration in development has occurred to "develop social productive forces, promote overall social progress, meet the needs of developing a socialist market economy, and expedite China's entry into the world economy."⁵⁶ In fact, China's progress in protecting intellectual property rights has covered "in a little more than a dozen years a distance which took other developed countries scores of years, even a hundred years" to accomplish.⁵⁷

Despite the improvements, the system of intellectual property rights protection is a new phenomenon in China and some of the Chinese population have an incomplete understanding of intellectual property.⁵⁸ The concept that copying is "wrong" is not part of Chinese culture. To the contrary, in China, the greatest compliment that authors can receive is having someone copy their works.⁵⁹ Thus, the recent implementation of intellectual property laws and confusion within the Chinese culture are possible explanations for continued infringement of U.S. copyrights.

The history of China's copyright and intellectual property rights protection indicates that China has made rapid changes and improvements in a short time. However, it may be unrealistic to expect China, after only a dozen years, to have achieved our level of understanding and to appreciate the need for copyright protection.

III. China's Attempts to Remedy the Problem of Copyright Infringement

Three recent developments have occurred in China with respect to copyright protection. Since 1990, China has (1) enacted a copyright law; (2) acceded to the two major international copyright conventions; and (3) established intellectual property courts and administrative offices to handle cases in that area. Additionally, China has made efforts to

53. *Id.*

54. *White Paper—"Intellectual Property Protection in China", supra note 49.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Susan Orenstein, *Disney Duels With Chinese "Pirates" Over Mickey: Case Goes to New Beijing Court*, *LEGAL TIMES*, July 25, 1994, at 2.

educate professional personnel and the general population about the intellectual property protection system.⁶⁰

China's intellectual property courts and administrative offices claim to adhere to a principle of equal treatment of citizens and foreigners.⁶¹ Therefore, foreign copyrights should be given protection in accordance with Chinese law and international treaties to which China is a party.

Nevertheless, because China's intellectual property protection system only recently has become operative, different degrees of infringement exist throughout the country. Further, Chinese officials have "closed their eyes to the scams for years. Now it's common practice and hard to stamp out."⁶² Consequently, U.S. companies are not always guaranteed the full copyright protection which could be afforded under the laws, treaties, court system, and administrative channels. To fully appreciate the Chinese system, it is necessary to analyze each aspect of Chinese copyright protection.

A. China's Copyright Law

China's copyright law was adopted on September 7, 1990 and became effective June 1, 1991.⁶³ Copyright protection automatically applies to a newly-created work and thus no registration is required.⁶⁴ The copyright law protects original works⁶⁵ by authors of literary, scientific, and artistic works.⁶⁶ The law also protects music, oral works, folk art forms, operas, choreography, films, photographs, television programs, video tapes, maps, graphic works, descriptions of product designs, and computer software.⁶⁷

In addition, the copyright law affords protection to moral and economic rights.⁶⁸ The moral and economic rights protected are

60. White Paper—"Intellectual Property Protection in China", *supra* note 49. The promulgation of each intellectual property law was followed by media publicity and widespread distribution of educational video tapes to help explain the scope and purpose of the laws. *Id.* In addition, the Chinese government has sent people abroad to receive training in intellectual property, and programs for intellectual property rights education and research have been implemented at approximately 70 educational institutions throughout China. *Id.*

61. *Id.*

62. Schmetzer, *supra* note 14.

63. White Paper—"Intellectual Property Protection in China", *supra* note 49.

64. P.R.C. Copyright Law, *supra* note 16, art. 2. See also Zheng Chengsi, *The First Copyright Law of the People's Republic of China*, 12 EUR. INTELL. PROP. REV. 376, 376 (1990).

65. Chengsi, *supra* note 64, at 377.

66. P.R.C. Copyright Law, *supra* note 16, art. 1. See also White Paper—"Intellectual Property Protection in China", *supra* note 49.

67. P.R.C. Copyright Law, *supra* note 16, art. 3.

68. *Id.* art. 10. Article 10 states "[t]he term 'copyright' shall include . . . personality and property rights." *Id.* See also Chengsi, *supra* note 64, at 377.

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publication,⁶⁹ authorship,⁷⁰ alteration,⁷¹ integrity,⁷² and exploitation and remuneration.⁷³ One deficiency concerning the moral and economic rights provision is its failure to indicate whether moral rights are assignable or transferable.⁷⁴

The law defines six acts that are considered infringement if done without the copyright owner's permission. The infringing acts include the following: (1) making public a work created by another person; (2) making public a work of joint-authorship as if it were the work of one author; (3) claiming authorship of the work of another; (4) distorting a work created by another; (5) exploiting a copyright owner's work without paying her according to the provisions of the law; and (6) disseminating a performance from the place of performance without the consent and license of the performers.⁷⁵ A plaintiff's possible remedies for these infringing acts are damages, an injunction, and an apology.⁷⁶

Certain acts are designated as serious infringements by the copyright law.⁷⁷ Serious infringements give rise to liability for the above-mentioned remedies, and, in addition, possible confiscation of the infringer's income and imposition of a fine.⁷⁸ Acts of serious infringement include: (1) plagiarism; (2) copying or adapting a work without a license for the purpose of profit; (3) publishing a book in which exclusive publishing rights belong to another publisher; (4) producing and distributing copies of a performance without the

69. P.R.C. Copyright Law, *supra* note 16, art. 10. The right of publication can be thought of as the right of divulgence or the right to decide whether to make a work available to the public. *Id.*

70. *Id.* The right of authorship is the right of the author to have his or her name mentioned in connection with the work. *Id.*

71. P.R.C. Copyright Law, *supra* note 16, art. 10. The alteration right is the right to change the work or to authorize others to change one's work. *Id.*

72. *Id.* The right of integrity protects an author's work from distortion. *Id.*

73. P.R.C. Copyright Law, *supra* note 16, art. 10. The rights of exploitation and remuneration include the right to exploit or authorize another to exploit one's work by reproduction, distribution, live performance, broadcasting, adaptation, translation, exhibition, compilation, or making movie, video or television productions. *Id.*

74. Zheng Chengsi & Michael D. Pendleton, *A Response to United States Government Criticisms of the Chinese Copyright Law*, 13 EUR. INTELL. PROP. REV. 257, 258 (1991). The drafting committee disagreed whether the right of publication should be characterized as a moral or economic right. *Id.* The disagreement led to complete omission as to whether moral rights are assignable or transferable. *Id.* Economic rights, however, may be inherited, transferred, or licensed. See BRAHM, *supra* note 15, at 68.

75. P.R.C. Copyright Law, *supra* note 16, art. 45. See also, Chengsi, *supra* note 64, at 378.

76. P.R.C. Copyright Law, *supra* note 16, art. 45.

77. See Chengsi, *supra* note 64, at 378.

78. P.R.C. Copyright Law, *supra* note 16, art. 46.

consent of the performer; (5) copying and distributing recordings of another producer; (6) re-broadcasting copies of broadcasting programs owned by another organization; and (7) putting a name other than the original artist on a work of fine art.⁷⁹

Additionally, China's copyright law affords protection to works of foreign authorship if the work is first published in China.⁸⁰ Works that are first published in other countries receive protection according to international treaties to which China and the specific country are parties.⁸¹ Thus, standing alone, the law fails to commit China to protection of foreign works.⁸²

B. China's Accession to Two Major International Copyright Conventions

China became a member of the Berne Convention for the Protection of Literary and Artistic Works⁸³ on October 15, 1992 and became a member of the Universal Copyright Convention⁸⁴ on October 30, 1992.⁸⁵ These conventions are the two major international conventions for the protection of copyrights.

On September 25, 1992, the National Council of China passed the International Copyright Treaties Implementation Rules to effectuate China's accession to the Berne Convention.⁸⁶ Article 2 of the Implementation Rules makes China's copyright law applicable to works of foreign authorship.⁸⁷

An important benefit of China's accession to the Berne Convention is that U.S. works now are entitled to the same protection as Chinese

79. *Id.* See also Chengsi, *supra* note 64, at 378-79.

80. Chengsi, *supra* note 64, at 377.

81. *Id.* See also P.R.C. Copyright Law, *supra* note 16, art. 2. Article 2 of the Copyright Law states that "[w]orks of foreigners first published in the territory of the People's Republic of China shall enjoy copyright in accordance with this Law." *Id.* Article 2 further states that a foreigner's work published outside of China will receive the protection of the copyright law if the work qualifies "to enjoy copyright under an agreement concluded between the country to which the foreigner belongs and China, or under an international treaty to which both countries are party." *Id.*

82. Another shortcoming is that neither article 2 nor any other provision of China's Copyright Law defines what is meant by "published" works or "first publication." This lack of clarity raises uncertainty in determining whether a work is eligible for protection. Chengsi & Pendleton, *supra* note 74, at 258.

83. Berne Convention, *supra* note 17.

84. UCC, *supra* note 18.

85. White Paper- "Intellectual Property Protection in China", *supra* note 49.

86. Gao Linghan, *Rules for the Implementation of the Berne Convention in the People's Republic of China*, 24 INT'L REV. OF INDUS. PROP. & COPYRIGHT L. 475, 475 (1993).

87. *Id.* at 477.

works.⁸⁸ As noted previously, China's copyright law standing alone affords protection to U.S. works only if they are "first published" in China.⁸⁹ Now, since both China and the United States are members of the Berne Convention, U.S. works are entitled to protection based on article 2 of China's copyright law.⁹⁰

C. Intellectual Property Courts

China has made significant improvements in its judicial system with respect to intellectual property protection. In December 1990, a court specializing in intellectual property cases was established in Beijing's intermediate people's court.⁹¹ In recognition of the special nature of intellectual property cases, the higher people's courts in Beijing, Shanghai, Fujian, Guangdong and Hainan also established intellectual property courts.⁹² In addition, the intermediate people's courts have established collegial panels specializing in intellectual property cases.⁹³ These intellectual property courts and panels were established to create unity in execution of the law and to improve and strengthen the quality of the judicial system in dealing with intellectual property issues.⁹⁴

When a Chinese intellectual property court tries a case involving foreigners, it adheres to the principles of national treatment and reciprocity by acting in accordance with Chinese law and relevant international conventions to which China is a party.⁹⁵ Western lawyers and business executives, however, criticize the Chinese judicial system.

88. *China's Legislature Approves Membership in Two Copyright Protection Conventions*, Pat., Trademark & Copyright L. Daily (BNA) (July 8, 1992), available in LEXIS, Copyrt Library, BNAPTD File. Another benefit of China's membership in the Berne Convention is that provisions of China's Copyright Law that were inconsistent with Berne are construed in favor of Berne protections. John Y. Lo & David C. Buxbaum, *Intellectual Property Issues Get Protection in China*, CHI. DAILY L. BULL., Apr. 6, 1993, at 6.

89. See *supra* notes 80-82 and accompanying text.

90. A work of a foreigner published outside of China is entitled to copyright protection based on an "international treaty to which both countries are party." P.R.C. Copyright Law, *supra* note 16, art. 2.

91. *China's First Collegiate Bench for Intellectual Property Rights Set Up in Beijing*, XINHUA NEWS AGENCY, Dec. 3, 1990, available in LEXIS, World Library, XINHUA File. Judicial activities of a people's court are carried out on a factual basis and with the law providing the criterion. *Id.* Cases are heard in open court and tried according to China's substantive and procedural laws of China. *Id.*

92. *White Paper- "Intellectual Property Protection in China"*, *supra* note 49. These courts have been set up since 1992 based on the needs of the various provinces. *Id.*

93. *Id.* Furthermore, all special economic zones and Beijing and Shanghai have intellectual property courts and the capital cities of other provinces have established intellectual property collegial panels. *Id.*

94. *Id.*

95. *White Paper- "Intellectual Property Protection in China"*, *supra* note 49.

They assert that the low salaries of judges make them susceptible to bribes, that judges lack legal training, and that Communist Party officials interfere with lawsuits.⁹⁶

D. Administrative Channels for Intellectual Property Protection

In addition to intellectual property courts, China has established administrative channels to address intellectual property issues. Pursuant to its copyright law,⁹⁷ China has established the State Copyright Administration and local copyright administrative bodies.⁹⁸ As of May 1994, however, the National Copyright Administration had only five officers responsible for copyright enforcement in all of China.⁹⁹ Besides the lack of administrative personnel, the administrative system has been criticized for insufficient knowledge of copyright and arbitrary performance of investigations.¹⁰⁰

China's *White Paper on Intellectual Property*, a document explaining the Chinese position on intellectual property, praises the administrative procedure and claims that investigations are handled promptly and efficiently.¹⁰¹ The White Paper states that local copyright administrative bodies heard approximately 150 cases involving pirated books and video products between June 1991 and the end of 1993.¹⁰² The local copyright offices supposedly punished the infringers by confiscating and destroying the pirated goods and imposing administrative sanctions.¹⁰³ Further, China claims that the administrative offices investigated cases of infringement of foreigners' intellectual property rights on their own initiative.¹⁰⁴

96. Schmetzer, *supra* note 14. In addition, U.S. officials claim that the Chinese Trade Ministry is politically weak and that some pirate plants are run by people with ties to the military. See Borrus, *supra* note 11.

97. Article 8 of the P.R.C. Copyright Law states that "[t]he copyright administration department under the State Council shall be responsible for the nationwide administration of copyright. The copyright administration department of each province . . . directly under the Central Government shall be responsible for the administration of copyright in its administrative area." P.R.C. Copyright Law, *supra* note 16, art. 8.

98. *White Paper- "Intellectual Property Protection in China"*, *supra* note 49.

99. *Chinese Crack Down of Piracy in Border City of Shenzhen*, 11 Int'l Trade Rep. (BNA) No. 18, at 707 (May 4, 1994).

100. Josephine Ma, *Lack of Knowledge and Checks Hinders Fight Against Piracy*, S. CHINA MORNING POST, Sept. 21, 1994, available in LEXIS, World Library, SCHINA File. In September 1994, the China United Intellectual Property Center was created to investigate complaints and bolster enforcement efforts. See Tefft, *supra* note 3, at 9.

101. *White Paper- "Intellectual Property Protection in China"*, *supra* note 49.

102. *Id.*

103. *Id.*

104. *Id.*

IV. The Effectiveness of China's Attempts to Eliminate Copyright Infringement

While China has improved its copyright protection system and has attempted to strengthen its intellectual property system, there is still a question as to whether these changes, apparently beneficial in theory, are effective in practice. Analysis of this issue is best considered in light of a recent case involving the Walt Disney Company.

In January 1994, Disney brought suit¹⁰⁵ in the Beijing People's Intermediate Court against the Beijing Children's Publishing Press, Beijing Publishing Press, and the New China Bookstore Distribution Centre.¹⁰⁶ Disney alleged that the publishing houses published and sold 300,000 copies of books¹⁰⁷ featuring famous Disney characters like Mickey Mouse, Snow White, Cinderella, and Peter Pan.¹⁰⁸ Accordingly, Disney asked for damages and requested that the publishing houses be enjoined from printing the books.¹⁰⁹

The Disney case is significant because it is the first copyright infringement case brought by a U.S. company that was adjudicated in a Chinese court.¹¹⁰ A Disney executive said the purpose of bringing the suit was "to test China's promise to put more teeth into its intellectual property laws."¹¹¹ The Disney executive further stated that the purpose of filing suit was to set a precedent.¹¹² In essence, a loss would be grounds for further complaining, while a win would serve as precedent for future success.¹¹³

Disney was successful, and in fact, this case marked the first time that a Chinese court recognized a U.S. company's copyright.¹¹⁴ The

105. Orenstein, *supra* note 59, at 2. Western lawyers familiar with Chinese piracy advise that business executives first should appeal to Beijing authorities before resorting to China's slow moving legal system. See Tefft, *supra* note 3, at 9. It is suggested, however, that some Beijing government officials are susceptible to bribery and overlook the piracy problem. *Id.* Local authorities tend to protect counterfeiters because their activities are profitable for the local economy and for themselves. *Id.*

106. Bronwen Maddox, *Chinese Pirates Fail to Take Mickey Out of Disney*, FIN. TIMES, Aug. 5, 1994, available in LEXIS, Asiapc Library, FINTME File.

107. *Beijing Court Begins Hearing Disney Copyright Case*, INT'L INTELLIGENCE REP., Aug. 5, 1994, available in LEXIS, Asiapc Library, REUWLD File.

108. Maddox, *supra* note 106.

109. *Beijing Court Begins Hearing Disney Copyright Case*, *supra* note 107.

110. Donna K.H. Walters, *Chinese Court Upholds Walt Disney Co. Copyright; Ruling: Size of Penalty is Seen as A Test of Commitment to Crack Down on Intellectual Property Piracy*, L.A. TIMES, Aug. 5, 1994, at D1.

111. Orenstein, *supra* note 59, at 2.

112. *Id.*

113. *Id.*

114. Walters, *supra* note 110.

Beijing court found that books published and sold by the three Chinese defendants "were identical to a series produced earlier by another Chinese company under a Disney license that expired in 1990."¹¹⁵

Despite the success in court, Disney found maneuvering through the Chinese legal system frustrating.¹¹⁶ First, local Chinese lawyers handled the case because foreign lawyers are not permitted to practice in Chinese courts.¹¹⁷ Further, the local lawyers focused on the wrong argument at a preliminary hearing. When the infringers contended they could publish the books because they had a license, the local lawyers incorrectly emphasized the expiration date of an old license granted by Disney to another company rather than arguing that the license was not transferable.¹¹⁸

Although Disney won the suit on liability, the court has yet to rule on damages and penalties.¹¹⁹ The amount of penalties imposed will be a major test of China's commitment to crackdown on piracy.¹²⁰ While China has enacted laws and established a system to tackle intellectual property issues, its penalties typically have been paltry.¹²¹ Harsher penalties could be a key to deterring potential pirates.¹²²

In light of developments in the Walt Disney case, it appears that China's intellectual property courts are attempting to enforce copyright protection. However, until the ultimate decision about damages is decided, it is difficult to predict China's commitment to improving copyright protection. At a minimum, the outcome in the Disney case indicates China's ability and willingness to take small steps in the right direction.

Although the Disney case is just one example of improvement in a sea of Chinese copyright infringement, the decision is significant for other U.S. companies that conduct business and trade in China. The ruling can be interpreted as a signal of China's intent to adhere to

115. *Id.*

116. Orenstein, *supra* note 59, at 2.

117. *Id.*

118. *Id.*

119. Benjamin Kang Lim, *China Court Favours Disney in Key Copyright Suit*, REUTERS WORLD SERV., Aug. 4, 1994, available in LEXIS, Asiapc Library, REUWLD File.

120. Walters, *supra* note 110. In the past, when U.S. companies have tried to protect their rights under China's trademark law, the few penalties imposed by Chinese courts have been insignificant. *Id.* For example, in an earlier Disney case involving trademark infringement, a Chinese publisher was fined only \$91.00. *Id.*

121. See *supra* part III.A.

122. Jeffrey Parker, *New Ally in War on Copyright Theft: China Victims*, REUTER ASIA-PACIFIC BUS. REP., Nov. 4, 1994, available in LEXIS, News Library, CURNWS File.

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international intellectual property protection standards.¹²³ Disney's success has motivated and may continue to motivate other U.S. companies to file infringement suits in Chinese courts.¹²⁴ Furthermore, if the Chinese court imposes a penalty that is proportionate to Disney's losses, U.S. companies will be more likely to invest their time and money in suing Chinese pirates.¹²⁵ If U.S. companies continue to file suits, China will be forced to take a firm stand to abolish copyright piracy and to improve intellectual property protection by enforcing the copyright law and recognizing the relevant international copyright conventions.

In addition to Disney's success, another development may help U.S. companies battle Chinese copyright piracy. This new ally in the war on piracy is Chinese victims themselves.¹²⁶ Eleven Chinese writers have banded together to sue Jilin University Publishing House and one of its editors.¹²⁷ The writers allege that one hundred of their writings were published in a ten book collection without their knowledge or consent.¹²⁸ This suit is significant because if Chinese citizens perceive themselves as victims of piracy, they will become aware of the need for intellectual property protection. As their awareness increases, piracy will not be tolerated, more suits will be filed, and penalties will become more severe.

The question for analysis, which Part IV of this Comment initially posed, was whether improvements in China's copyright protection have been effective. In light of the Disney case, the answer to that question is not clear. Disney was a landmark decision. Yet, it is only one step in the right direction. Many more steps need to be taken before the question posed can be answered in the affirmative. As noted above, the

123. Walters, *supra* note 110.

124. See generally Schmetzer, *supra* note 14, at 1. For example, in July 1994, China's intellectual property courts accepted complaints from Microsoft Corp., Lotus Development Corp. and Autodesk Inc. *Id.* These companies allege that five Chinese companies illegally copied, developed, and sold their products. *Id.* More recently, on February 24, 1995, a Chinese court heard arguments in a case brought by eight U.S. movie studios. Dominic Bencivenga, *Trade Pact With China: Enforcement Seen Key to Stamping Out Piracy*, N.Y.L.J., Mar. 2, 1995, available in LEXIS, News Library, CURNWS File. The eight plaintiffs, Universal City Studios, The Walt Disney Co., United Artists Corp., Tristar Pictures, Twentieth Century Fox Film Corp., Paramount Pictures, Time Warner Entertainment, and Columbia Pictures allege that Xianke Laser Market and the World of Audio-Video infringed their copyrights of 18 movies by distributing and selling laser discs of the U.S. filmmakers' movies. *Chinese Movie Piracy Trial Postponed*, BC CYCLE, Feb. 24, 1995, available in LEXIS, Asiapc Library, CURNWS File.

125. Walters, *supra* note 110.

126. Parker, *supra* note 122.

127. *Id.* The Jilin University Publishing House is a state owned press in northeast China. *Id.*

128. *Id.*

Disney case may motivate other companies to take action against Chinese copyright pirates. That development, along with Chinese recognition that they too are victims of infringement, may lead to continued success in the courtroom and imposition of harsher, more costly penalties. If U.S. companies continue to file suit against Chinese infringers and if Chinese authors continue to perceive themselves as victims of piracy, the Chinese government and judiciary will be forced to actively combat the infringement problem.

V. Actions the United States Can Take to Protect Against Chinese Copyright Infringement

As one potential remedy, U.S. companies can file suits against Chinese infringers and hope for the success experienced by the Walt Disney Company. However, the United States has additional means available to protect U.S. copyrights and to motivate China to adhere to higher standards of intellectual property protection. Such means include utilizing and enforcing section 301 of the Omnibus Trade and Competitiveness Act of 1988 [hereinafter Special 301], conditioning China's desire to join the General Agreement on Tariffs and Trade [hereinafter GATT] on improved intellectual property protection, and utilizing the remedies set forth in the Agreement on Trade Related Aspects of Intellectual Property [hereinafter TRIPS]. The following sections take a closer look at these means of protection that the United States can employ to protect U.S. interests in China.

A. *Special 301*

The Omnibus Trade and Competitiveness Act of 1988¹²⁹ contains a provision known as "Special 301."¹³⁰ The goal of Special 301 is to promote and enhance protection of intellectual property rights in foreign countries.¹³¹ Special 301 is designed to use the threat of unilateral retaliation by the United States to persuade and motivate trading partners to reform inadequate intellectual property practices.¹³²

Pursuant to Special 301, the U.S. Trade Representative (USTR) must, within thirty days after issuance of the National Trade Estimate

129. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified in scattered sections of 19 U.S.C.).

130. *Id.* §§ 1301, 1303, 102 Stat. 1164-76, 1179-81 (1988).

131. Judith H. Bello & Alan F. Holmer, "Special 301": *Its Requirements, Implementation, and Significance*, 13 FORDHAM INT'L L.J. 259, 259 (1989-90).

132. *Id.* at 259.

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Report,¹³³ identify foreign countries that “deny adequate and effective protection of intellectual property rights”¹³⁴ or “deny fair and equitable market access to United States persons that rely upon intellectual property protection.”¹³⁵ Special 301 also requires the USTR to identify priority foreign countries.¹³⁶ Priority foreign countries are those countries that have the most onerous or egregious policies or practices¹³⁷ and whose policies have the greatest actual or potential adverse impact on U.S. goods.¹³⁸ Priority foreign countries also include those countries that are not negotiating in good faith or making significant progress in bilateral or multilateral negotiations to improve intellectual property protection.¹³⁹ In identifying priority foreign countries, the USTR must consult with the Commissioner of Patents and Trademarks, the Register of Copyrights, and other appropriate government officials.¹⁴⁰ A foreign country will be identified as a priority foreign country only if the USTR finds a “factual basis for the denial of fair and equitable market access as a result of the violation of international law or agreement.”¹⁴¹

After identifying a priority foreign country, the USTR has thirty days to initiate an investigation into the laws and practices of that country.¹⁴² The USTR has six months to complete the investigation and to attempt negotiation of bilateral solutions.¹⁴³ The USTR must then monitor the implementation of the agreed-upon measures.¹⁴⁴ If the USTR determines that the foreign country is not satisfactorily implementing the measures, or if there is no resolution of U.S. concerns,

133. 19 U.S.C. § 2241(b) (1988). Subsection (b) requires publication of the National Trade Estimate Report.

134. 19 U.S.C. § 2242(a)(1)(A) (1988).

135. *Id.* § 2242(a)(1)(B).

136. *Id.* § 2242(b)(1).

137. *Id.* § 2242(b)(1)(A).

138. *Id.* § 2242(b)(1)(B).

139. 19 U.S.C. § 2242(b)(1)(C) (1988).

140. *Id.* § 2242(b)(2)(A).

141. *Id.* § 2242(b)(3). Denial of fair and equitable market access means that a foreign country denies access to a market for a product protected by copyright through the use of laws, procedures, or practices that violate provisions of international law to which both the United States and the particular foreign country are parties. *Id.* § 2242(d)(3).

142. *Id.* § 2412(b)(2)(A).

143. 19 U.S.C. § 2414(a)(3)(A) (1988). The investigation may be extended three additional months if complex issues are involved or if the foreign country is making substantial progress in implementing measures that will effectively protect intellectual property rights. *Id.* § 2414(a)(3)(B).

144. *Id.* § 2416(a).

the USTR is authorized to retaliate by increasing duties or imposing restrictions on imports.¹⁴⁵

Special 301 is a mechanism that the United States can employ to battle Chinese copyright piracy of U.S. goods. When the USTR determines that China's activities amount to unfair trade practices, or that its intellectual property protection standards diverge from U.S. or international standards, trade sanctions may be imposed to pressure China to comply with our demands.

On June 30, 1994, the USTR named China a priority foreign country under Special 301.¹⁴⁶ China had until December 31, 1994 to comply with U.S. requests.¹⁴⁷ China was asked to sign a written agreement committing to copyright protection measures that could be monitored.¹⁴⁸ In December 1994, the USTR warned China that a list enumerating goods subject to potential trade sanctions would be published if no progress was made in negotiations between the United States and China.¹⁴⁹ Because insignificant progress was made and no agreement was reached, on February 4, 1995, the USTR ordered imposition of trade sanctions on \$1.08 billion of Chinese goods.¹⁵⁰ The sanctions were scheduled to become effective on February 26, 1995.¹⁵¹ Likewise, China responded to the United States' threat of Special 301 sanctions by doubling tariffs on some U.S. imports and freezing initiatives by U.S. carmakers to enter the Chinese market.¹⁵²

The United States' threat to impose trade sanctions did not materialize and a full blown trade war was averted because the United States and China reached an agreement on February 26, 1995.¹⁵³ According to the agreement, the Chinese government has agreed to (1) take immediate steps to address rampant piracy throughout China; (2) make long-term changes to ensure effective enforcement of

145. *Id.* § 2416(b).

146. *China Cited Under Special 301 Law: Copyright Protection Criticized*, *supra* note 5, at 1066. China was cited because of rampant computer software and compact disk piracy. *Id.* The USTR said that enforcement of intellectual property laws is "sporadic at best and virtually non-existent for copyrighted works." *Id.*

147. Simon Beck, *USA: US Warns China on Copyright Violations*, S. CHINA MORNING POST, Nov. 3, 1994, available in LEXIS, Asiapc Library, CHINA File.

148. *Id.* The agreement was specifically drafted and left no room for ambiguity or interpretation by China. *Id.*

149. *U.S., China Announce Broad Agreement on Intellectual Property Protection*, *supra* note 1, at 515.

150. *Id.*

151. *Id.*

152. Sheila Tefft, *Billion Dollar Threats Fly in U.S.-China Trade Brawl*, CHRISTIAN SCI. MONITOR, Feb. 6, 1995, available in LEXIS, News Library, CURNWS File.

153. *Id.*

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intellectual property rights; and (3) provide U.S. right holders with enhanced access to the Chinese market.¹⁵⁴

Although the current agreement is broken down into three areas, its primary focus is on enforcement.¹⁵⁵ As indicated previously, China has a structure of intellectual property laws, administrative agencies, and courts available to provide intellectual property protection but has not utilized these mechanisms to effectuate a significant decrease in copyright infringement.¹⁵⁶ Under the agreement, a new enforcement structure will be established in China, which will include a special enforcement period to "clean-up" large scale producers of infringing goods.¹⁵⁷ So far, during the special enforcement period, seven of the twenty-nine factories that produce pirated CD's and movie laser disks have been closed.¹⁵⁸

Special 301 is a powerful bargaining chip for the United States to use in persuading China to enforce higher copyright standards. Special 301 has proven effective in the past,¹⁵⁹ and it ultimately proved to be

154. *USTR Announcement and Summary of U.S.-China Agreement on IP Protection*, 49 Pat., Trademark & Copyright J. (BNA), at 521-22 (Mar. 2, 1995). Under part 1 noted in the text, China has agreed to implement a special enforcement period, take action against factories that currently produce infringing products, and prohibit export of illegal products. *Id.* at 521. According to part 2 of the agreement, enforcement provisions that the Chinese have agreed to undertake include (1) prohibiting use of unauthorized intellectual property products by China's government ministries; (2) establishment of an intellectual property enforcement structure comprised of conference working groups at all levels of government to coordinate enforcement efforts and draft and implement legislation; (3) creation of a customs enforcement system modeled after the U.S. Customs Service; (4) creation of title verification to prevent the distribution and sale of U.S. audio visual works; (5) assurance that U.S. rights holders have access to effective judicial relief; (6) establishment of a system to provide the U.S. government with statistics detailing Chinese enforcement efforts; (7) providing training about the importance of intellectual property protection for judges, lawyers, government officials, and business people; and (8) strict enforcement of laws. *Id.* at 521-22. Under the access portion of the agreement, China has agreed not to place quotas on U.S. audio visual imports, to allow U.S. companies to enter joint venture agreements for the production and reproduction of their goods in China, and to allow U.S. record companies to market the full spectrum of their works in China. *Id.* at 522.

155. *U.S., China Announce Broad Agreement on Intellectual Property Protection*, *supra* note 1, at 515.

156. *See supra* part III.

157. *See supra* *USTR Announcement and Summary of U.S.-China Agreement on IP Protection*, note 154.

158. *U.S., China Announce Broad Agreement on Intellectual Property Protection*, *supra* note 1, at 515.

159. Lo & Buxbaum, *supra* note 88. A Special 301 investigation was initiated against China in 1992 to probe inadequate intellectual property protection. *Id.* Threats of trade sanctions were exchanged, but China ultimately conceded to U.S. demands. *Id.* The president of the International Intellectual Property Alliance stated that "[t]he '92 agreement focused 90 percent on bringing China's statutory law and legislative regulatory system up to international standards." *U.S., China Announce Broad Agreement on Intellectual Property Protection*, *supra* note 1, at 516. Although

effective in the most recent trade dispute between the United States and China.

At this point, the ball is in China's court. China claims it is ready, willing, and able to take action against copyright pirates, but its record of actual enforcement in curtailing infringement has been inconsistent. The current issue will be whether China is prepared to "follow up words with action and . . . enforce what they[] have agreed to."¹⁶⁰

It is difficult, however, to predict whether China will take this opportunity to show the United States that it is willing to fight copyright piracy. Thus far, during the special enforcement period mandated by the new agreement, sales of pirated computer software have continued.¹⁶¹ In fact, one software store has made light of the U.S.-China agreement with an advertisement that reads "[n]ew measures take effect soon so stock up now. Once the last bus leaves it's a great opportunity lost."¹⁶²

B. *China's Desire to Join GATT*

China applied to join GATT in 1986.¹⁶³ China is eager to join GATT because membership would be worth billions of dollars in additional exports.¹⁶⁴ The USTR said the United States will "staunchly support" China's bid to join GATT only if China meets international standards for intellectual property protection.¹⁶⁵ Until Chinese laws protecting patents and copyrights are more strictly enforced, however, the United States will block China's efforts to enter GATT.¹⁶⁶

China's behavior in the intellectual property arena is not only a concern to the United States, but one that is being addressed in World Trade Organization talks.¹⁶⁷ Because China's desire to enter GATT hinges on U.S. support, China must convince the United States that it is ready to consistently enforce laws to deter and punish intellectual

China has fulfilled most of the terms of the 1992 agreement, it has consistently failed to enforce the anti-piracy provisions. Bencivenga, *supra* note 124.

160. Bencivenga, *supra* note 124.

161. Jeffrey Parker, *Software Piracy Flourishes Despite U.S. China Pact*, REUTER ASIA-PAC. BUS. REP., Mar. 6, 1995, available in LEXIS, Topnws Library, 2WEEK File.

162. *Id.*

163. Lo & Buxbaum, *supra* note 88, at 6. China's efforts in developing and improving its intellectual property protection system is attributable to its desire to join GATT. See *supra* part III.

164. Schmetzer, *supra* note 14, at 1.

165. *China Cited Under Special 301 Law: Copyright Protection Criticized*, *supra* note 5, at 1066. GATT will evolve into the World Trade Organization in 1995 and China is eager to be a founding member. See Tefft, *supra* note 3, at 9.

166. Tefft, *supra* note 3, at 9.

167. Beck, *supra* note 147.

property rights infringers. One way China could convince the United States that it is seriously committed to protect intellectual property rights would be to strictly enforce the terms of the new agreement it reached with the United States.

The United States can, therefore, pressure China to abide by the terms of the latest agreement on intellectual property protection by linking this issue to GATT membership. If, however, China is offered GATT membership, it will have to agree to the entire package.¹⁶⁸ China will not be permitted to comply with certain GATT provisions and ignore others.

C. TRIPS

If China becomes a member of GATT, it will have to comply with the agreement under GATT known as the Agreement on Trade Related Aspects of Intellectual Property Rights [hereinafter TRIPS].¹⁶⁹ The purpose of TRIPS is to reduce impediments to international trade, to promote effective protection of intellectual property rights, and to ensure that measures to enforce intellectual property rights do not become barriers to legitimate trade.¹⁷⁰

TRIPS enumerates standards for the protection of copyrights, trademarks, patents, trade secrets, geographical indications, layout designs of integrated circuits, industrial designs, and control of anti-competitive practices.¹⁷¹ Specifically, TRIPS requires members to comply with Berne Convention copyright standards.¹⁷² Remedies available under TRIPS to an aggrieved party include injunctions,¹⁷³

168. *China Holds Key to Entry Into GATT, Barshefsky Says*, 11 Int'l Trade Rep. (BNA) No. 41, at 1598 (Oct. 19, 1994).

169. TRIPS, *supra* note 22. This agreement was formulated at the Uruguay Round of multilateral trade negotiations of December 15, 1993. *Id.* According to the draft agreement, different timetables for implementation of TRIPS apply to different countries. In general, countries must implement TRIPS within one year after the agreement becomes effective. Gao Lulin, *Taking a Stand: China's Enforcement of Intellectual Property Protection Laws*, CHINA BUS. REV., available in LEXIS, News Library, CURNWS File. However, developing countries have been extended an additional four years to comply with TRIPS. *Id.* Developing countries having difficulty providing patent protection may receive an additional five year extension for implementing specific provisions of TRIPS. *Id.* Least-developed countries may have up to ten years to implement TRIPS. *Id.* Although entitled to a maximum of nine years within which to implement TRIPS, China has already attained world intellectual property protection standards. *Id.*

170. TRIPS, *supra* note 22, at 87.

171. *Id.* pt. II, §§ 1-8.

172. *Id.* pt. II, § 1, art. 9(1).

173. *Id.* pt. III, § 2, art. 44(1). Injunctions are imposed to prevent goods that infringe upon intellectual property rights from entering a country's channels of commerce. *Id.*

damages,¹⁷⁴ or other remedies.¹⁷⁵ Criminal procedures are available in cases of willful trademark counterfeiting or copyright piracy on a commercial scale.¹⁷⁶

Thus, if and when China is permitted to join GATT, it will have to abide by the TRIPS agreement. In the future, the United States may be able to utilize remedies authorized by TRIPS to require China to maintain international standards of intellectual property protection in combatting copyright piracy.

VI. Conclusion

Chinese copyright piracy is a problem that costs U.S. companies billions of dollars annually. China has enacted a copyright law, acceded to the international copyright conventions, and established intellectual property courts and administrative channels to deal with the problem.¹⁷⁷ Despite these improvements, however, copyright infringement still exists to a great extent. China has the tools to eliminate copyright infringement, but has not used them effectively in practice.¹⁷⁸

Infringement still may exist because China has not yet arrived at a heightened level of understanding regarding copyright protection. Although it may be unrealistic to expect China to view copyright in the same manner as the United States, it is necessary for China to step up enforcement of copyright and other intellectual property rights if it hopes to be a player in international trade.

U.S. companies that do business in China may benefit from the recent success of the Walt Disney Company.¹⁷⁹ The Disney case may indicate China's commitment to punishing copyright pirates. U.S. companies also may benefit as Chinese victims of copyright infringement begin to pressure their government to take action.¹⁸⁰ In addition, the U.S. government can threaten to employ Special 301 to pressure and

174. TRIPS, *supra* note 22, pt. III, § 2, art. 45. Infringers may be ordered to pay the copyright holder adequate damages to compensate for injuries suffered due to intellectual property rights infringement if the infringers knew, or had a reasonable basis to know, that they were engaged in infringing activity. *Id.*

175. *Id.* pt. III, § 2, art. 46. Other remedies include disposal of the infringing goods outside the channels of commerce in a manner that avoids harming the copyright holder, or destruction of the infringing goods. *Id.*

176. TRIPS, *supra* note 22, pt. III, § 5, art. 61. Remedies available under criminal procedures include imprisonment, monetary fines, or seizure, forfeiture and destruction of the infringing goods. *Id.*

177. *See supra* part III.

178. *See supra* part IV.

179. *Id.*

180. *Id.*

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sanction China to bring its copyright policy into line with international standards. Finally, the United States can link improved copyright and intellectual property protection to China's bid to become a GATT member. By using the measures outlined in this Comment, the United States can protect U.S. goods from copyright infringement and persuade China to utilize the improvements it has made over the past decade to eliminate copyright piracy.

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